No. 34636-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

ARISTIDES GUEVARA,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 16-1-00085-5

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Terry J. Bloor, Deputy
Prosecuting Attorney
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. RESPONSE TO ASSIGNMENTS OF ERROR 1

II. STATEMENT OF FACTS 1

III. ARGUMENT 4

A. State's Response to Defendant's Argument Number 1 4

1. The defendant waived the objection because he requested the sidebar. 4

2. Facts regarding the sidebar. 5

3. Under the experience and logic test, the sidebar discussion did not constitute a courtroom closure. 5

a. "Experience" prong. 5

b. "Logic" prong. 6

B. State's Response to Defendant's Argument No. 2 7

1. The standard on review: Manifestly apparent the State was not seeking to impose multiple punishments for the same offense. 8

2. Considering the evidence, arguments, instructions, and the special verdict that there were multiple incidents of Rape of a Child in the First Degree, it was manifestly apparent that the jury found separate acts of sexual intercourse when L.A.Z. was under 12 8

a. The jury instructions 8

b. The evidence 10

c. The closing argument 11

d. The special verdicts 11

e. *Carter*, *Berg*, and *Borsheim* are distinguishable because they did not consider the entire record. 12

f. Conclusion 12

C. State's Response to Defendant's Argument Number 3 12

D. State's Response to Defendant's Argument Number 4 13

E. State's Response to Defendant's Argument Number 5 13

1. Standard on review 14

2. Under this three-prong test, the exceptional sentence was appropriate. 14

a. Reasons supported by the record 14

b & c. Do those reasons justify a departure from the standard range as a matter of law under a de novo standard; and was the sentence imposed clearly too excessive under the abuse of discretion standard? 15

3. Additional response to defendant's argument. 15

a. The defendant argues: "The State may not enhance a standard range term absent a clear jury verdict premised on allegations charged and proven to the jury." Br. of Appellant at 35. The defendant also argues: "The jury's verdict may not rest on uncharged allegations." Br. of Appellant at 36. 15

b. The defendant argues: "The jury was permitted to convict Mr. Guevara of aggravating circumstances based on uncharged allegations outside the charging period." Br. of Appellant at 37 16

F. State's Response to Defendant's Argument Number 6 17

1. Possession of pornography 17

2. Requiring polygraph testing 17

3. Requirement to avoid places where children congregate 18

G. State's Response to Defendant's Argument Number 7 19

IV. CONCLUSION 19

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Det. of Ticeson, 159 Wn. App. 374, 246 P.3d 550 (2011) 6
State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008) 17
State v. Baker, 74 Wn. App. 87, 871 P.3d 673 (1994) 15
State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008) 8, 9, 12
State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007) 12
State v. Carter, 156 Wn. App. 561, 234 P.3d 275 (2010) 9, 12
State v. Duvall, 86 Wn. App. 871, 940 P.2d 671 (1997) 16
State v. France, 176 Wn. App. 463, 308 P.3d 812 (2013) 13
State v. Friedlund, 182 Wn.2d 388, 341 P.3d 280 (2015) 13
State v. Irwin, 191 Wn. App. 644, 364 P.3d 830 (2015) 18
State v. Magana, 197 Wn. App. 189, 389 P.3d 654 (2016) 18
State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) 5
State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011) 8, 9, 10, 11, 12
State v. Noltie, 116 Wn.2d 831, 809 P.2d 190 (1991) 11
State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998) 17
State v. Shearer, 181 Wn.2d 564, 334 P.3d 1078 (2014) 5
State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014) 6
State v. Whitlock, 188 Wn.2d 511, 396 P.3d 310 (2017) 6, 7

WASHINGTON STATUTES

RCW 7.68.035 4
RCW 9.68A.011(4) 17
RCW 9.94A.507 4
RCW 9.94A.535 13
RCW 9.94A.535(3)(g) 13, 17
RCW 9.94A.535(3)(n) 13

OTHER AUTHORITIES

WPIC 3.01 ..... 8, 9
WPIC 4.25 8

I. RESPONSE TO ASSIGNMENTS OF ERROR

A. Response to argument regarding sidebar and courtroom closure: The defendant asked for the sidebar; the court need not address the issue. Nevertheless, under the experience and logic test, a sidebar is not a courtroom closure.

B. Response to argument regarding double jeopardy and the to-convict instructions on Rape of a Child in the First Degree: Looking at the entire record, it is clear the jury found separate acts of Rape of a Child in the First Degree.

C. Issues regarding exceptional sentence: The exceptional sentence should be affirmed, but the matter should be remanded for the trial court to enter written findings of fact and conclusions of law.

D. Response to challenges to community custody requirements: There should be some modifications, which are discussed in the brief.

E. Appellate costs: The State agrees that they should not be imposed and thus will not seek appellate costs.

II. STATEMENT OF FACTS

Substantive facts on crimes charged:

The following is a timeline of key events:

April 15, 1962: Defendant born.

2002: The defendant moves in with Dalia Zamarripa and her husband, Jose, who live in Kennewick, Washington. RP[1] at 333. Ms. Zamarripa was pregnant with L.A.Z. at the time. RP at 333. While Jose and Dalia separated in 2013 (RP at 334), the defendant continued to live in Kennewick, Washington. RP at 499.

January 28, 2003: L.A.Z. is born. RP at 332.

January 2012 (approximately): The defendant begins inappropriately touching L.A.Z. around age nine. RP at 441. She states the first time was when her parents had left for work. RP at 441. The defendant had her sit in his lap and he touched her breast and vaginal area over her clothing. RP at 442.

January 2012 to approximately end of 2014 or beginning of 2015 (RP at 460): The sexual abuse escalates to oral sex and intercourse. RP at 447, 449-51, 465-66. The defendant would frequently be alone with L.A.Z. when she would translate for him on jobs (RP at 317), when he had doctor appointments (RP at 365), and when he would take her to stores (RP at 374). The sexual abuse occurred at the defendant's apartment (RP at 439), in L.A.Z.'s bedroom (RP at 443), in the defendant's bedroom (RP at 444), in his bathroom (RP at 446), and in his van (RP at 455).

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[1] Unless otherwise indicated, "RP" refers to the verbatim report of proceedings for the jury trial and sentencing, transcribed by court reporter Patricia Adams, numbered volumes I through IV, and dated June 13-16, 2016, and August 4, 2016.

The last time L.A.Z. remembers a sexual assault was at her grandparents' house around the end of 2014 or beginning of 2015 when she was in the 6th grade. RP at 459. He pushed her up against the wall of a hallway and touched her vagina. RP at 460.

December 16, 2015: L.A.Z. tells Nancy Trinidad, a Spanish Youth Minister volunteer with St. Joseph's in Kennewick, Washington, that she wants to tell her something. RP at 304. L.A.Z. had a close connection with Ms. Trinidad. RP at 437. L.A.Z. herself had a leadership role with the youth ministry. RP at 302. Ms. Trinidad and L.A.Z. agreed that she would tell her mother (RP at 306), which she did that night (RP at 342-43).

December 17, 2015: L.A.Z., with her mother, reports the abuse to the Kennewick Police Department. RP at 469.

Charges, verdict, and sentence:

The defendant was charged in the Second Amended Information with:

Count I: Rape of a Child in the First Degree, alleging a time frame of January 28, 2009, to January 27, 2015, with aggravating factors of Pattern of Sexual Abuse and Position of Trust;

Count II: Rape of a Child in the First Degree, alleging a time frame of January 28, 2009, to January 27, 2015, with aggravating factors of Pattern of Sexual Abuse and Position of Trust;

Count III: Child Molestation in the First Degree, alleging a time frame of January 28, 2009, to January 27, 2015, with aggravating factors of Pattern of Sexual Abuse and Position of Trust. CP 26-28.

The jury found him guilty of all three counts and found that all aggravating factors were proven. CP 107-15. The counts are subject to an indeterminate sentence. RCW 9.94A.507; CP 127-36. The trial court imposed an exceptional sentence regarding the minimum sentences for each offense. The standard range for the minimum sentence on Counts I and II was 162-216 months and the court imposed an exceptional sentence of 276 months. CP 129-30. On Count III, the standard range for the minimum sentence was 98-130 months, and the court imposed an exceptional sentence of 190 months. CP 129-30.

The only costs imposed were $500 for the Victim Assessment (RCW 7.68.035; CP 131) and the filing fee of $200 (CP 146).

III. ARGUMENT

A. State's Response to Defendant's Argument Number 1 ("Considering evidentiary matters implicating constitutional rights at an inaudible sidebar constituted a courtroom closure and violated Mr. Guevara's right to a public trial." Br. of Appellant at 13.):

1. The defendant waived the objection because he requested the sidebar.

The defendant requested the sidebar at issue. RP at 461. Failure to object does not constitute a waiver of the defendant's right to a public

trial. *State v. Shearer*, 181 Wn.2d 564, 569, 334 P.3d 1078 (2014). However, the situation is different if the defendant affirmatively advocates for the closure and benefits from it. *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009). Since the defendant affirmatively requested the sidebar, he should not be allowed to argue that it was error.

Nevertheless, the State will address the merits of the argument.

2. Facts regarding the sidebar:

The defendant repeatedly states the sidebar was "inaudible." In the sense that spectators, jurors, and the defendant could not hear the conversation, that is correct. However, it was on the record, fully transcribed, and audible to the participants.

Also, the discussion about filing an amended Information was mentioned in open court later. RP at 493-94. The sidebar discussion was mentioned at that time. RP at 494.

Therefore, the only matter of concern is the discussion of the defendant's objection to testimony from the victim about her sexual abuse after the age of 13.

3. Under the experience and logic test, the sidebar discussion did not constitute a courtroom closure.

a. "Experience" prong:

The "experience" prong implicates whether the place and process have historically been open to the press and general public. *State v. Smith*, 181 Wn.2d 508, 514, 334 P.3d 1049 (2014). The *Smith* court held that sidebar conferences have historically occurred outside the view of the public, citing treatises from 1894 to 1974, and a case from 2011 (*In re Det. of Ticeson*, 159 Wn. App. 374, 384-86, 246 P.3d 550 (2011)). 181 Wn.2d at 515.

b. "Logic" prong:

The logic prong concerns whether public access plays a significant positive role in the functioning of the particular process in question. *Smith*, 181 Wn.2d at 514. Again, the *Smith* court held that

> evidentiary rulings that are the subject of traditional sidebars do not invoke any of the concerns the public trial right is meant to address regarding perjury, transparency, or the appearance of fairness. . . . Nothing positive is added by allowing the public to intrude on the huddle at the bench in real time.

Id. at 518.

Smith dealt with 13 *hallway* sidebar conferences involving evidentiary issues. *Id.* at 512-13 (emphasis added). The court found there was no courtroom closure.

State v. Whitlock, 188 Wn.2d 511, 396 P.3d 310 (2017), is distinguishable. That case involved a bench trial in which the defendants

sought to impeach a victim/witness by asking a question that could reveal she was a confidential informant. 188 Wn.2d at 515. The State requested a sidebar, unlike this case in which the defendant requested the sidebar. *Id.* at 516. The court declined the sidebar, called a recess, and called counsel into chambers. *Id.* The court reporter and the defendants were not present. *Id.* Before the lunch recess and without the defendants present, the court and counsel summarized the in-chambers proceeding. *Id.*

The distinguishing facts are: 1) bench trial, 2) State requested sidebar, 3) trial court refused the sidebar and recessed to chambers, 4) in-chambers proceeding was not transcribed and the defendants were not present, and 5) when the proceeding was put on the record, the defendants were not present.

The defendant in this case affirmatively requested a sidebar because he did not want the jury to believe he was trying to keep evidence from them. This should constitute a waiver of an objection that a sidebar occurred. However, sidebars happen in almost all jury trials. Experience and logic tells us that sidebars do not constitute courtroom closures.

B. State's Response to Defendant's Argument No. 2 ("Mr. Guevara's multiple overlapping convictions for the same child rape offense at the same time violate double jeopardy." Br. of Appellant 21.)

1. The standard on review: Manifestly apparent the State was not seeking to impose multiple punishments for the same offense.

State v. Mutch, 171 Wn.2d 646, 663-64, 254 P.3d 803 (2011), dealt with a similar issue and held that even with a unanimity instruction, the jury should also be advised that they must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count.

However, the reviewing court may look to the entire record, including the evidence, arguments, and the instructions. "[I]f it is not clear that it was '*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act, there is a double jeopardy violation." 171 Wn.2d at 664 (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

2. Considering the evidence, arguments, instructions, and the special verdict that there were multiple incidents of Rape of a Child in the First Degree, it was manifestly apparent that the jury found separate acts of sexual intercourse when L.A.Z. was under 12.

a. The jury instructions:

The trial court gave the unanimity instruction. CP 93; WPIC 4.25. The trial court instructed that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should

not control your verdict on any other count." (CP 85; WPIC 3.01), and gave separate instructions for all counts (CP 95, 96, 97).

The *Mutch* court held these were not sufficient to ensure that it was manifestly apparent to the jury that the State was seeking punishment for separate acts. The State respects this decision. There should have been a clause in the "to-convict" instructions saying "to convict the defendant on Count I . . . that the defendant had sexual intercourse with L.A.Z. separate and distinct from the act alleged in Count II . . . ." However, the *Mutch* court held that an insufficient instruction may not result in a reversal. 171 Wn.2d at 663. The court specifically criticized *State v. Carter*, 156 Wn. App. 561, 234 P.3d 275 (2010), and *State v. Berg* for not looking beyond the jury instructions or engaging in further inquiry. 171 Wn.2d at 663.

Furthermore, the jury instructions at least came close to meeting the reasonably apparent requirement that it was manifestly apparent that the State was seeking multiple punishments for separate acts. The jury was instructed that they must be unanimous *on any count* that one particular act of sexual intercourse occurred for either count of Rape of a Child in the First Degree. The jury was told that if they found the defendant guilty of Count I—which they could only do if they unanimously found a particular act of sexual intercourse—it would not control the other count

of Rape of a Child in the First Degree. They were given separate "to-convict" instructions for each count.

It is difficult to see how a jury could conclude from these instructions that they could convict the defendant for two counts of first degree child rape based on the same act. Given the evidence, closing argument, and special verdicts, it is clear that the jury could only conclude that separate acts were charged in Counts I and II.

b. The evidence:

The jury's choice was to either believe L.A.Z. beyond a reasonable doubt or believe that the defendant's testimony created a reasonable doubt. As stated in *Mutch*, "if the jury believed [the victim] regarding one count, it would as to all." 171 Wn.2d at 666. Based on the verdicts, the jury believed L.A.Z. beyond a reasonable doubt. Her testimony included numerous specific examples of oral sex and actual intercourse; the defendant stated he never touched L.A.Z. inappropriately. It is clear from the evidence that there were multiple incidents of sexual intercourse.

The defendant states that L.A.Z. "had a fuzzy memory and gave ambiguous evidence about the timing and details of the allegations." Br. of Appellant at 28. Please note the comment of the trial judge: "And frankly, in all of my years, I don't believe I have ever heard a more credible mother or a more credible victim in the type of case." RP at 588.

c. The closing argument:

The deputy prosecutor correctly told the jury that they would have to agree on a specific act of sexual intercourse to find the defendant guilty. The prosecutor reminded the jury of the numerous episodes of sexual intercourse L.A.Z. testified to. The jury would have to agree on some specific act; for example, they could agree on an act of oral sex or a specific example of intercourse L.A.Z. testified to. But, "you have to just agree on which acts." RP at 546. The prosecutor's closing argument on this subject begins on RP at 544, line 24, and continues to RP at 546, line 16. Both *State v. Noltie*, 116 Wn.2d 831, 849, 809 P.2d 190 (1991), and *Mutch*, 171 Wn.2d at 665, cited the prosecutor's closing argument as a factor in determining that the jury was asked to determine if there were two different offenses for double jeopardy purposes.

d. The special verdicts:

The special verdicts for Counts I and II, Rape of a Child in the First Degree, are helpful. The jury answered for both counts that the Rape of a Child in the First Degree was part of an ongoing pattern of sexual abuse of L.A.Z. manifested by multiple incidents over a prolonged period of time. CP 108, 111. This should resolve any question of whether the jury found only one episode of sexual intercourse.

e. *Carter*, *Berg*, and *Borsheim* are distinguishable because they did not consider the entire record.

The courts in *Carter*, *Berg*, and *State v. Borsheim*, 140 Wn. App. 357, 165 P.3d 417 (2007), specifically did not consider the entire record, including closing arguments, in resolving the issue. They were decided before *Mutch*, which specifically criticized the refusal to look at the entire record, rather than only the jury instructions. *Borsheim* also had the problem that the jury was given only one "to-convict" instruction for all four counts of Rape of a Child in the First Degree. 140 Wn. App at 364-65.

f. Conclusion:

Based on the special verdicts finding the defendant engaged in a pattern of sexual abuse, the prosecutor's closing statement telling the jury that they must use separate acts to convict the defendant in Count I and Count II, the evidence of numerous acts of sexual intercourse, and the jury instructions, it was manifestly apparent to the jury that the State was not relying on the same act in Counts I and II.

C. State's Response to Defendant's Argument Number 3 ("The judge's factual determination that the aggravating factors were substantial and compelling reasons for imposing an exceptional sentence violated Mr. Guevara's right to trial by jury." Br. of Appellant at 29.):

The jury did find two aggravating factors for Counts I and II: that both crimes were part of a pattern of sexual abuse, RCW 9.94A.535(3)(g), and that the defendant used his position of trust to facilitate the crimes, RCW 9.94A.535(3)(n). CP 108, 109, 111, 112. The defendant's argument that these verdicts are merely advisory and that the trial court judge alone determined the factual basis for the aggravating factors is incorrect.

D. State's Response to Defendant's Argument Number 4 ("The exceptional sentence was not validly imposed where the court failed to comply with the statutory mandate that it find substantial and compelling factors justified the imposition of the exceptional sentence." Br. of Appellant at 32.):

The State agrees that written Findings of Fact and Conclusions of Law imposing an Exceptional Sentence should have been entered. The remedy is to remand for the purpose of entering such Findings. *State v. Friedlund*, 182 Wn.2d 388, 397, 341 P.3d 280 (2015). The defendant's argument that a new sentencing hearing is required is incorrect.

The trial court orally found that the facts establishing the aggravating factors were "well established." RP at 590. Written findings of fact are a requirement under RCW 9.94A.535. The holding in *Friedlund* is clear, but it will not change the defendant's sentence.

E. State's Response to Defendant's Argument Number 5 ("The exceptional sentence must be reversed due to the insufficiency of the aggravating factors." Br. of Appellant at 35.):

1. Standard on review:

To reverse an exceptional sentence, an appellate court must consider: 1) are the reasons supported by the record under the clearly erroneous standard of review; 2) do those reasons justify a departure from the standard range as a matter of law under a de novo standard; and 3) was the sentence imposed clearly too excessive under the abuse of discretion standard. *State v. France*, 176 Wn. App. 463, 308 P.3d 812 (2013).

2. Under this three-prong test, the exceptional sentence was appropriate.

a. Reasons supported by the record:

The basis for both aggravating factors are well supported. Regarding the "ongoing pattern of sexual abuse," L.A.Z. testified to numerous incidents of sexual abuse. The defendant started touching her under her clothes when she was in the 3rd grade. RP at 478. He began having sex with her in the middle of her 4th grade year. RP at 478. The sexual abuse went on into her 6th grade year. RP at 459. The abuse occurred in his apartment (RP at 465), in his vehicle (RP at 455), in his bedroom (RP at 444), in her bedroom (RP at 443), and even while on a fishing trip (RP at 449).

Likewise, the position of trust aggravating factor was well supported. The defendant was L.A.Z.'s great uncle. RP at 333. He was a

respected member of L.A.Z.'s family and she was taught to respect him. RP at 438. L.A.Z. said he was a person of authority. RP at 438. L.A.Z. was frequently alone with the defendant, probably because she and her parents thought he was honorable person.

Factors to determine if a defendant abused a position of trust include: the length of the relationship with the victim, the trust relationship between the primary caregiver and perpetrator of the sexual offense against the child, vulnerability of the victim to trust because of age, and the degree of the defendant's culpability. *State v. Baker*, 74 Wn. App. 87, 871 P.3d 673 (1994). All of these factors are present in this case.

b. & c. Do those reasons justify a departure from the standard range as a matter of law under a de novo standard; and was the sentence imposed clearly too excessive under the abuse of discretion standard?

The defendant has not argued otherwise.

3. Additional response to defendant's argument.

a. The defendant argues: "The State may not enhance a standard range term absent a clear jury verdict premised on allegations charged and proven to the jury." Br. of Appellant at 35. The defendant also argues: "The jury's verdict may not rest on uncharged allegations." Br. of Appellant at 36.

The exceptional sentence was based on the special jury verdicts on the alleged aggravating factors. The First Amended Information and

Second Amended Information both allege the aggravating factors. CP 18-20, 26-28. The exceptional sentence was based on charged allegations proven to the jury.

b. The defendant argues: "The jury was permitted to convict Mr. Guevara of aggravating circumstances based on uncharged allegations outside the charging period." Br. of Appellant at 37.

The pattern of sexual abuse aggravating factor recognizes that the effect of any single act of sexual abuse is more devastating when the victim has been routinely subjected to similar acts. *State v. Duvall*, 86 Wn. App. 871, 877, 940 P.2d 671 (1997). Thus, in *Duvall* evidence that the defendant sexually abused his victim in Oregon could be considered in determining whether there was a pattern of abuse for the crime that occurred in Washington.

Likewise, the fact that the defendant last abused L.A.Z. when she may have been 13 may help establish a pattern of abuse for when she was between the ages of 9 and 12.

The defendant could have requested an instruction limiting the use of the evidence about any sexual abuse which occurred after L.A.Z. turned 13. The instructions and Information tied the special verdict forms to the specific crime charged. The jury could only answer "yes" if it was proven beyond a reasonable doubt that *the crime* was part of an ongoing pattern of

sexual abuse. CP 26-28, 101, 102, 103, 108, 111, 114. There was no need to allege a specific period of time for the aggravating factor because it was set forth in the crime associated with the aggravator. The language of the pattern of abuse instruction matches the statute, RCW 9.94A.535(3)(g).

F. State's Response to Defendant's Argument Number 6: ("Unduly vague or overbroad or impermissible community custody conditions must be stricken." Br. of Appellant at 41.)

1. Possession of pornography:

The State agrees that the term "pornography" is vague. *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). The provision should read that the defendant "shall not use or possess any ~~pornographic~~ materials *depicting sexually explicit conduct, as defined in RCW 9.68A.011(4)*, to include magazines, internet sites, and videos."

2. Requiring polygraph testing:

The State agrees that this should be rewritten to: The defendant shall "submit to polygraphs and/or plethysmograph testing upon the request of his therapist and/or supervising Community Corrections Officer, at your own expense, *in order to monitor compliance with the other conditions of community custody.*" *State v. Riles*, 135 Wn.2d 326, 342, 957 P.2d 655 (1998).

3. Requirement to avoid places where children congregate:

State v. Magana, 197 Wn. App. 189, 389 P.3d 654 (2016), dealt with the following provision: "Do not frequent parks, schools, malls, family missions or establishments where children are known to congregate *or other areas as defined by supervising CCO [(Community Corrections Officer)]*." (emphasis added). The court held this provision gave too much discretion to the CCO and struck it. 197 Wn. App. at 201.

State v. Irwin, 191 Wn. App. 644, 649, 364 P.3d 830 (2015), dealt with the following community custody condition: "Do not frequent areas where minor children are known to congregate, as defined by the supervising [Community Corrections Officer (CCO)]." The court struck this provision because it did not give sufficient notice of what the CCO would declare as an "area where minor children are known to congregate." 191 Wn. App. at 665. If the CCO set a specific limitation, it would be subject to arbitrary enforcement. 191 Wn. App. at 655.

The provision in this case does not give the CCO any authority to designate such areas. It states, "Avoid places where children congregate, including parks, libraries, playgrounds, schools, daycare centers and video arcades." CP 139. This provision avoids the problems in *Magana* and *Irwin.*

If the provision should be remanded it could read, "Avoid *the following* places where children congregate~~,~~*:* ~~including~~ parks, libraries, playgrounds, schools, daycare centers and video arcades."

G. State's Response to Defendant's Argument Number 7 ("Appeal costs should not be awarded." Br. of Appellant at 48.):

The State will not seek costs.

IV. CONCLUSION

The conviction should be affirmed. The defendant himself asked for the sidebar conference. He should not be allowed to object to it on appeal. The sidebar was transcribed, held in open court. The issues discussed concerned the Information, which was put on the record later, and an issue about an objection. The sidebar does not constitute a courtroom closure under the experience and logic test.

Looking at the entire record, while the "to-convict" instruction should have told the jury to convict the defendant for separate acts of Rape of a Child in the First Degree, it is manifestly clear that the jury understood this based on the instructions they were given, the evidence of numerous acts of intercourse, the prosecutor's direction in closing argument, and the jury's verdicts finding multiple instances of sexual abuse.

The grounds for an exceptional sentence were pled and proven. The jury by special verdict found both grounds. The trial court judge verbally stated the facts supported those verdicts. The exceptional sentence was appropriate.

However, the case should be remanded for the trial court to memorialize its decision granting an exceptional sentence with written Findings of Fact and Conclusions of Law.

The case should also be remanded to strike or modify certain community custody requirements discussed above.

RESPECTFULLY SUBMITTED this 24th day of August, 2017.

ANDY MILLER
Prosecutor

Terry J. Bloor, Deputy
Prosecuting Attorney
Bar No. 9044
OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Susan Gasch
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005

☒ E-mail service by agreement was made to the following parties: gaschlaw@msn.com

Signed at Kennewick, Washington on August 24, 2017.

Courtney Alsbury
Appellate Secretary

BENTON COUNTY PROSECUTOR'S OFFICE

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